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No. 92-849

In The

Supreme Court of the United States

October Term, 1992

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

MARTA ZAMBRANO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court have federal question jurisdiction over a claim that final INS legalization regulations violated the Immigration Reform and Control Act?

2. After finding that INS had implemented unlawful regulations throughout the whole of the INS-designated application period, did the court have the authority to provide a remedy for that unlawful conduct?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The petition should be denied because there is no conflict in the circuits on the issues presented and the Ninth Circuit's decision comports with Supreme Court precedent.

MISSTATEMENT OF THE REGULATIONS CHALLENGED

The petition does not accurately describe the regulations challenged in this case. Petitioners set forth in their Appendix provisions labeled 8 C.F.R. § 245a.2(d)(4) (1988) and 8 C.F.R. § 245a.2(k)(4) (1988). These are not the regulations challenged in this case nor were these rules in effect in 1988.

The regulatory provisions challenged in this case were those in effect as of May 1, 1987, 52 Fed.Reg. 16205: 8 C.F.R. § 245a.1(i) (1987), 8 C.F.R. § 245a.2(d)(4) (1987) and 8 C.F.R. § 245a.2(k)(4) (1987). (App., *infra*, 1a-2a). These regulations were amended on November 17, 1987, 52 Fed.Reg. 43843 (App., *infra*, 4a) and further amended on July 12, 1989, 54 Fed.Reg. 29442, 8 C.F.R. § 245a.1(i) (1989), 8 C.F.R. § 245a.2(d)(4) (1989) and 8 C.F.R. § 245a.2(k)(4) (1989) (App., *infra*, 5a-6a).

To correct petitioners' misstatements, the applicable regulations are reproduced in the Appendix to this brief. They are not discussed in detail because the petitioners do not contest the district court's holding that the regulations were unlawful. The opinions of the court below provide a detailed, accurate explanation of these regulations, their regulatory history and the underlying legislative history. *Zambrano v. INS*, Orders of Aug. 9, 1988; July 31, 1989 (Pet. App., 22a-24a, 47a-49a).

STATEMENT

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, created a

mandatory entitlement to legalization for several classes of deportable aliens who lived "in a twilight, sub rosa society . . . vulnerable to exploitation. . . . " 132 Cong. Rec. H9712-13 (Oct. 9, 1986) (Statement of Rep. Mazzoli). Congress intended that the legalization application period, for these individuals who had "contributed to the United States in myriad ways . . . ," run for a full twelve months. Legalization was to be "implemented in a liberal and generous fashion . . . to ensure true resolution of the problem and . . . that the program [would] be a one-time only program." H.R. Rep. No. 99-682, Part I, 99th Cong., 2d Sess. 49, 72, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5653, 5676.[1]

Congress recognized that the legalization program could succeed only if "the fear of prosecution or deportation [that] would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status . . . " could be overcome. *McNary v. Haitian Refugee Center*, ___ U.S. ___, 111 S. Ct. 888, 892 (1991). IRCA thus required the Attorney General to "broadly disseminate information" about legalization and its eligibility requirements beginning no later than the first day of the program. The Act also called for the Attorney General to designate and train community-based organizations – "qualified designated entities (QDEs) – to help disseminate legalization eligibility information and to assist individuals in filing their applications. 8 U.S.C. § 1255a(c)(2); (i).

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[1] Congress also implemented an employer sanctions program to prevent undocumented aliens in the U.S. from working in the future. 8 U.S.C. § 1324a.

Another section of the statute provided that all applicant information, with limited exceptions, remain confidential and not be used for any purpose other than adjudication of legalization claims. 8 U.S.C. § 1255a(c)(5).[2]

INS's regulations required aliens to apply for temporary resident status – the first phase of the legalization program – between May 5, 1987 and May 4, 1988[3] and set forth the eligibility criteria for legalization. 8 C.F.R. §§ 245a.2(a)(1), (b).

Under IRCA, the Attorney General "shall" confer legal status on any individual who makes a "timely application," has resided in the U.S. since before January 1, 1982 and is otherwise admissible as an immigrant. 8 U.S.C. § 1255a(a). One of the grounds of inadmissibility is that the applicant is "likely at any time to become a public charge . . . " 8 U.S.C. § 1182(a)(4).[4] To effectuate the Act's goals as stated above, Congress liberalized the standards for those who could not meet the traditional "public charge" test. That is, an otherwise eligible applicant

[2] Citing this provision, INS appealed portions of the district court orders that required the agency to disclose the names of certain class members to class counsel. The Ninth Circuit affirmed the orders of the lower court, *Zambrano*, 972 F.2d at 1125-26, and the Service does not raise that issue in the present petition.

[3] IRCA required that the Attorney General designate a "12-month period beginning on a date (not later than 180 days after November 6, 1986) . . . ," i.e. May 5, 1987. 8 U.S.C. § 1255a(a)(1)(A). The application period did in fact begin on that date and closed on May 4, 1988.

[4] Before 1990, this provision was codified at § 1182(a)(*15*).

who could show an employment history and other forms of self-support must be granted legalization.[5] 8 U.S.C. § 1255a(d)(2)(B)(iii)(Supp. II 1990).

The INS, however, implemented regulations that required more than self-support and also made the grant of legalization to a self-supporting applicant discretionary. 8 C.F.R. §§ 245a.2(d)(4); 245a.1(i); 245a.2(k)(4); 52 Fed. Reg. 16211, 16208, 16212 (May 1, 1987).

Respondents are a class of individual legalization applicants,[6] mainly immigrant parents. These people have lived in the United States since before 1982 and have been self-supporting. They or their U.S. citizen children have at one time received some type of public assistance to which they were legally entitled. However, as noted above, the published regulations that were in force throughout the entire application period excluded these immigrant parents and others from the legalization program.

[5] An applicant failing to meet this relaxed test could still request a waiver from INS. 8 U.S.C. § 1255a(d)(2)(B)(i) - (ii).

[6] The first subclass is composed of all legalization applicants residing within the Ninth Circuit whose timely-filed applications were or would be denied on the basis that they were likely to become a public charge. Orders of Aug. 9, 1988; Sept. 20, 1988. (Pet. App., 25a-27a; 38a). The second subclass includes all persons within the Ninth Circuit who were discouraged from applying for legalization by the May 1988 deadline by the INS or any organization because of the regulations concerning "proof of financial responsibility." Order of July 31, 1989. (Pet. App., 57a-58a).

Respondents commenced an action challenging these regulations – as contrary to IRCA and the U.S. Constitution – while the legalization application period was still open and moved for a preliminary injunction. They sought an order requiring INS to (1) disseminate the correct public charge standard before the end of the application period while class members could still file for legalization; and (2) reconsider those applications which were erroneously denied. The district court granted respondents' motion on August 9, 1988.[7] (Pet. App., 12a).

Almost one year later, the lower court granted respondents' motion for *partial* summary judgment,[8] modified the class definition and entered a permanent injunction. Order of July 31, 1989. (Pet. App., 43a). The court reaffirmed its holdings that jurisdiction was proper and that it had the authority, under the doctrine of equitable tolling, to order INS to begin accepting applications – during a 6-month period – from individuals who had earlier been discouraged from applying because of the agency's illegal regulations and failure to disseminate proper information as to the public charge standard.[9]

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[7] The court held – and INS did not appeal – that the "proof of financial responsibility" and "public cash assistance" regulations violated the IRCA public charge provisions. Order of Aug. 9, 1988. (Pet. App., 22a-24a).

[8] INS incorrectly characterized the motion as one for *summary* judgment. *Zambrano* Petition at 5. The district court affirmed its earlier ruling that the regulations in question violated IRCA. Order of July 31, 1989. (Pet. App., 47a-49a). Again, INS did not appeal this portion of the order.

[9] On December 11, 1989, the court partially granted respondents' motion for contempt against INS because the agency had,

Petitioners (hereafter "INS" or "the Service") do not contest the district court's holding that these regulations violated IRCA[10]. In fact, INS admitted the unlawfulness of the regulations by changing them in 1989 after the agency-designated application period closed. 54 Fed.Reg. 29448-49 (July 12, 1989). INS now asserts only that the district court did not have the authority to decide whether the regulations comported with the statute and that, even if subject matter jurisdiction existed, the court did not have authority to provide a remedy for harm caused by the agency's implementation of unlawful regulations. Petition for a Writ of Certiorari, *INS v. Zambrano*, 92-849 at 6-7 (hereafter *Zambrano* Petition).

After consolidating the appeals, the Ninth Circuit affirmed the lower court's rulings. *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992) (Pet. App., 1a).

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inter alia, failed to accept applications for filing from certain would-be class members. Respondents appealed other portions of the order. However, the Ninth Circuit upheld the district court, *Zambrano*, 972 F.2d at 1126, and respondents have not filed a cross-petition for a writ of certiorari with this Court.

[10] The same regulations challenged here were declared unlawful by the Second Circuit Court of Appeals, and INS declined to appeal that ruling. *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992), *petition for cert. pending on other grds. sub nom. Barr v. Perales*, No. 92-451.

REASONS FOR DENYING THE WRIT

POINT I

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE OF DISTRICT COURT JURISDICTION TO REVIEW CHALLENGES TO INS LEGALIZATION REGULATIONS.

INS asserts that the writ should be granted in this case because it raises questions similar to those pending before the Court in *Barr v. Catholic Social Services, Inc.*, No. 91-1826 (hereafter *CSS*). *Zambrano* Petition at 6. The basis for the petition for certiorari in *CSS* was the erroneous contention that there is conflict in the circuits on the issue of district court jurisdiction to review INS's legalization regulations. The *CSS* petition points to the case of *Ayuda, Inc. v. Thornbugh*, 948 F.2d 742 (D.C. Cir. 1991), *petition for cert. pending*, No. 91-1924, as being in conflict with the decision in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir.), *cert. granted sub nom. Barr v. Catholic Social Services, Inc.*, 112 S. Ct. 2990 (1992). *CSS* petition at 10. On the contrary, the decision of the D.C. Circuit denying rehearing *en banc* in *Ayuda* makes clear that there is no intercircuit conflict on the question presented here and in *CSS*: whether IRCA precludes general federal question jurisdiction over a claim that final INS legalization regulations violate that statute. *Ayuda, Inc. v. Thornburgh*, 958 F. 2d 1089 (D.C. Cir. 1992).

Judge Silberman, joined by Judge Ginsburg, wrote the *Ayuda* panel decision relied upon by *CSS* petitioners

for their claim of intercircuit conflict.[11] Yet, in a separate opinion supporting denial of rehearing *en banc*,[12] Judge Silberman, again joined by Judge Ginsburg, concluded that there is *no* "intercircuit dispute" on the question of subject-matter jurisdiction to review INS regulations. He noted that the Seventh Circuit in *Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991), had upheld district court jurisdiction to review formal final INS legalization regulations as had the Ninth Circuit in *CSS*. Judge Silberman distinguished *Morales* and *CSS* on the ground that *Ayuda* did not involve a challenge to "formal (and final) regulations." *Ayuda*, 958 F.2d at 1093. Judge Posner drew this same distinction in *Morales*, 952 F. 2d at 957. *See also, Perales*, 967 F.2d at 807.[13]

Thus, three circuits – the Second, Seventh and Ninth – agree that the district courts have subject-matter jurisdiction over challenges to INS legalization regulations and the D.C. Circuit has expressed no disagreement.

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[11] The *Ayuda* panel had decided, on the alternative grounds of lack of either ripeness or subject matter jurisdiction, that the district court could not consider the contention that INS misinterpreted the legalization statute by failing to recognize persons who had not filed a particular form as "known to the government." The plaintiffs had argued that this failure was a challengeable INS practice. *Ayuda*, 948 F.2d at 745, 754.

[12] The D.C. Circuit denied a hearing *en banc per curiam*, with five members in favor of granting rehearing. Judges Wald and Williams pointed to the lack of ripeness holding as the basis for the Circuit's decision to deny rehearing *en banc*. *Ayuda*, 958 F.2d at 1090, 1093.

[13] Writing for the court in *Perales*, Judge Walker would also subject *other* agency action to judicial review. 967 F.2d at 806-808.

POINT II

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE OF JUDICIAL AUTHORITY TO REMEDY UNLAWFUL INS ACTION.

Similarly, there is no intercircuit conflict on the second question presented by INS: whether the federal judiciary can provide a remedy for the agency's illegal administration of the legalization program. The Second Circuit and three panels of the Ninth Circuit have answered this question in the affirmative. *Perales*, 967 F.2d at 811-814; *CSS*, 956 F. 2d at 919-921; *Zambrano*, 972 F. 2d at 1124; *Legalization Assistance Project v. INS*, 976 F.2d 1198, 1213; 1215 (9th Cir. 1992). The D.C. Circuit, in *Ayuda*, did not reach this issue. 948 F. 2d at 756.

There being no intercircuit conflict on either issue presented, certiorari was improvidently granted in *CSS* on that basis and should not be granted here. *See, Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393 (1923). *See also*, Supreme Court Rule 10.1(a).

POINT III

THE CIRCUIT COURT RULINGS IN THIS CASE AND *CSS* ARE COMPLETELY CONSISTENT WITH SUPREME COURT PRECEDENT.

As this Court reaffirmed only two terms ago, there is a "well-settled presumption" allowing judicial review of agency action. *McNary*, 111 S. Ct. at 898. *See also, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). The circuit court's determination in this case and *CSS* that subject-matter jurisdiction exists for challenges

to agency regulations violative of federal statutes is fully consistent with this Court's precedent. *See, Bowen*, 476 U.S. at 670-674. *See also, Morales v. Yeutter*, 952 F. 2d at 957.

INS's position, on the other hand, is completely contrary to the norm of effective and fair judicial review of whether agency regulations comply with a statute. In this case, petitioners would allow INS to prevent any judicial review of its admitted unlawful action and therefore to violate the law with impunity. According to the INS, any judicial consideration of whether agency regulations comport with the statute would depend entirely on whether the agency affirmatively decided to initiate a deportation proceeding.

The consequences of this position for the respondent immigrant parents and their citizen children would be devastating. The parents would be subject to deportation and foreclosed access to lawful employment. *See, McNary*, 111 S. Ct. at 891, 895. Their children would be doomed to perpetual welfare dependency and either the underground life of their undocumented parents or total separation from their parents. As this Court found in *McNary*, such a scenario is tantamount to a complete denial of judicial review. *McNary*, 111 S. Ct. at 898.

Further, under the Service's position, even if INS did initiate a deportation proceeding, the issue of whether the regulations comport with the statute would be reviewed by components of the agency that have no authority to determine that issue. After such costly, inefficient and useless delay, the court of appeals would confront the issue without the benefit of district court

consideration. Moreover, the judicial determinations could not occur within the one-year time period set for legalization, thus assuring that the courts would not have an effective, meaningful voice in stating what a statute means. This is "the practical equivalent of total denial of judicial review" of statutory claims. *Id.*

Additionally, the circuit court rulings in *CSS* and this case on the relief issue fully comport with IRCA and this Court's precedents. INS sought certiorari in *CSS* on the assertion that the Ninth Circuit's allowance of a judicial remedy there conflicts with "this Court's analysis in *[INS v.] Pangilinan*," 486 U.S. 875 (1988). *CSS* Petition at 20.

Subsequent to the government's petition in *CSS*, the Second Circuit issued its decision in *Perales*, holding that nothing in IRCA or *Pangilinan* strips the federal judiciary of its traditional power to remedy agency violations of federal law. *Perales*, 967 F.2d at 811-814. *Accord, Zambrano v. INS*, 972 F.2d at 1124-25; *Legalization Assistance Project v. INS*, 976 F.2d at 1215. *See, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 681 (noting the settled presumption that Congress "expects the courts to grant relief when an executive agency violates [a statutory] command").[14]

In essence, INS's contention is that *Pangilinan* indiscriminately bars judicial relief in any case involving an

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[14] As noted above, INS has conceded that it violated federal law in its administration of the legalization program.

immigration statute and a filing deadline.[15] This proposition is illogical, since in the name of deference to Congress, it would prohibit judicial relief even where such relief advances congressional intent. As the Ninth Circuit rightly concluded, *Pangilinan* simply does not posit such an extreme and irrational rule. Rather, in *Pangilinan*, this Court carefully determined Congress' intent with respect to the statutes at issue and gave effect to that intent. 486 U.S. at 884-885.

Thus, there is no credible claim that the Ninth and Second Circuits failed to abide by *Pangilinan*, since the teaching of that decision is that congressional intent controls. This Court's only statement on the congressional intent behind IRCA appears in *McNary*, which reaffirmed that Congress meant to create a "broad," remedial legalization program. 111 S. Ct. at 890-892 and nn. 4-5. Nothing in IRCA and no decision of this Court is remotely to the contrary.

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[15] The Service has asserted that *Pangilinan* is "on all fours with" *CSS*. *CSS* Petition at 17. But, the underlying statutes in the two cases – the Naturalization Act of 1940, as amended, and the Immigration Reform and Control Act of 1986 – bear no resemblance to one another with respect to legislative mandate, policy or intent.

POINT IV

IF THIS COURT RULES FOR PETITIONERS IN *CSS*, THERE ARE OUTSTANDING ISSUES IN THIS CASE WARRANTING A REMAND TO THE NINTH CIRCUIT.

INS states that the Ninth Circuit's decision in this case should be reversed if this Court determines that the district court, in *CSS*, did not have authority to determine whether an INS regulation comported with IRCA. *Zambrano* Petition at 6. If this Court makes such a determination in *CSS*, the *Zambrano* case should not be reversed. Rather, it should be remanded to the Ninth Circuit.

There was one claim that neither the Ninth Circuit nor the district court addressed in this case. *Zambrano v. INS*, 972 F.2d 1122; Civ. No. S-88-455, (E.D. Cal., Orders of Aug. 9, 1988 and July 31, 1989). In addition to their claim that the INS regulations violated IRCA, respondents also challenged the rules as a violation of their right to equal protection of the law. Pltfs' Second Amended Cmplt., ¶¶ 61-64. The Service concedes that the presumption in favor of judicial review of Constitutional claims is even stronger than the presumption in favor of review of statutory claims. Brief for Petitioners, *Barr v. CSS*, No. 91-1826 at 20. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 373-374 (1974). Therefore, even if this Court finds there was no subject-matter jurisdiction in *CSS*, it should remand this case to the Ninth Circuit.

Also, if this Court agrees with INS that in *CSS* the court of appeals lacked authority to provide an opportunity for legalization applicants to file applications after the agency-imposed deadline, this case should be

remanded to the Ninth Circuit. The district court based its remedy decision on only one of the claims made and the specific facts of the *Zambrano* case as applied to that one claim. The other claim and appropriate remedies would have to be assessed. Respondents' Constitutional claim stands on a different footing from the statutory claims in *CSS*, since federal judicial authority to remedy legal wrongs is at its height where Constitutional rights have been abridged. See *Pangilinan*, 486 U.S. at 885-886 (separately analyzing Constitutional claims after concluding that Congress intended to foreclose relief for alleged statutory violations).

Remand would also be appropriate if this Court does not reach the remedial doctrine of equitable tolling in *CSS*.[16] The district court in *Zambrano* made clear that its decision was based on this doctrine. Orders of Aug. 9, 1988 and July 31, 1989. (Pet. App., 32a-33a, 55a). As the Ninth Circuit in *Zambrano* did not distinguish the basis of its ruling, but followed its prior decision in *CSS* as the law of the circuit, *Zambrano*, 972 F.2d at 1124-25, this remedial question may still remain. Therefore, remand, not reversal, would be appropriate.

If this Court affirms the *CSS* determinations on subject matter-jurisdiction and remedy, the decision in this case should be affirmed or the writ denied.

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[16] The Ninth Circuit did not address the applicability of the equitable tolling doctrine in *CSS*, 956 F.2d at 921-923, or in *Legalization Assistance Project*, 976 F.2d at 1215. The Second Circuit declined to consider the doctrine in *Perales*. 967 F.2d at 811.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 15, 1992

APPENDIX

8 C.F.R. §245a.2(d)(4), 52 Fed. Reg. 16211 (May 1, 1987)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment, the burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant.

8 C.F.R. §245a.1(i), 52 Fed. Reg. 16208 (May 1, 1987)

(i) "Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food

stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 16212 (May 1, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision, the weight given in considering applicability of the public charge provisions will depend on may [sic] factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(k)(2), 52 Fed. Reg. 16212 (May 1, 1987)

(2) Waiver of grounds of exclusion. Except as provided in paragraph (k)(3) of this section, the

Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised on the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the legalization office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the legalization office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the applicant's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or admitted fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service Legalization Office for re-interview, such application may be approved at the discretion of the district

director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of § 103.3(a) of this chapter.

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 43844 (Nov. 17, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision, the weight given in considering applicability of the public charge provisions will depend on may [sic] factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(d)(4), 54 Fed. Reg. 29449 (July 12, 1989)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges, generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide.

8 C.F.R. §245a.1(i), 54 Fed. Reg. 29448 (July 12, 1989)

(i) "Public cash assistance" means income or needs-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency

treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. §245a.2(k)(4), 54 Fed. Reg. 29449 (July 12, 1989)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors; but the length of time an applicant has received public cash assistance will constitute a significant factor.